90-619

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MID-COUNTY FUTURE ALTERNATIVES COMMITTEE, AN OREGON CORPORATION, and PETER M. SMITH,

Petitioners,

v.

CITY OF PORTLAND, CITY OF GRESHAM, PORTLAND METROPOLITAN AREA LOCAL BOUNDARY COMMISSION, MULTNOMAH COUNTY, and STATE OF OREGON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

GREGORY W. BYRNE
1200 Standard Insurance Center
900 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 323-9100

Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Does a state statute which annexes certain unincorporated areas to adjacent cities based on the consent of a majority of landowners in the affected areas violate the Equal Protection Clause of the 14th Amendment because it denies residents who do not own land an equal voice in the process?

PARTIES

The names of all parties to the proceeding in the Supreme Court of the State of Oregon appear in the caption of the case. Petitioner Mid-County Future Alternatives Committee has no parent companies, subsidiaries, or affiliates.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

CITY OF PORTLAND, CITY OF GRESHAM, PORTLAND METROPOLITAN AREA LOCAL BOUNDARY COMMISSION, MULTNOMAH COUNTY, and STATE OF OREGON, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon in the above-entitled proceeding issued on July 17, 1990.

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 310 Or 152, 795 P2d 541 (1990), and is reprinted in the appendix

hereto, p. 1a, infra.

The opinion of the Oregon Court of Appeals is reported at 95 Or App 556, 770 P2d 604 (1989), and is reprinted in the appendix hereto, p. 37a, infra.

The Opinion and Order of the Multnomah County Circuit Court is unpublished, and is reprinted in the appendix hereto, p. 46a, infra.

JURISDICTION

1. Judgment was entered in the Oregon Supreme Court on July 17, 1990. No rehearing was sought.

2. The Court has jurisdiction to review the judgment in question by writ of certiorari under 28 USC sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORS **199.490 Procedure for minor boundary changes or transfers of territory.**

(1) A proceeding for a minor boundary change other than a transfer of territory may be initiated:

(a) By resolution of the governing body of the affected city or district;

(b) By petition signed by 10 percent of the electors registered in the affected territory;

(c) By petition signed

by the owners of at least one-half the land area in the affected territory; or

(d) By resolution of a boundary commission having jurisdiction of the affected territory.

(2)(a) An annexation proceeding may also be initiated by a resolution adopted by the governing body of the affected city or district upon receiving consent to annex their land in writing from more than half of the owners of land in the territory proposed to be annexed, who also own more than half of the land in the territory proposed to be annexed and of real property therein representing more than half of the assessed value of all real property in the territory proposed to be annexed.

ORS **199.495 Effect of ORS 199.490.** In a proceeding initiated as provided by ORS 199.490 (2) and (5):

(1) If the proposed annexation is approved by the commission, the final order shall be effective at the time specified in the final order...

ORS **199.534 Legislative annexation of territory to cities and districts; effective date; effect on**

other minor boundary changes. Notwithstanding any other provision of this chapter or ORS chapter 222, territory annexed or transferred to a city or district by a minor boundary change approved by a boundary commission's final order adopted after January 1, 1985, but before July 18, 1987, shall be in the annexing city or district by operation of ORS 198.855, 199.490, 199.531, 199.534, 222.120 and 222.170 to 222.177 commencing upon the effective date of the boundary commission's final order.

STATEMENT OF THE CASE

1. Statement of Facts.

Plaintiffs reside in territories annexed to the cities of Portland and Gresham by orders of the Portland Metropolitan Area Local Boundary Commission. The Boundary Commission followed procedures specified in state statutes[1] which permitted the resident electors of the affected territory to vote on the annexation unless the city

[1]ORS 199.490, 199.495

initiating the proceeding obtained the written consent to annexation of a majority of the owners of land in the affected territory, owning more than half of the land being annexed and representing more than half of the assessed value of the real property being annexed. If this so-called "triple-majority" consent was obtained, the annexation became effective on the date of the Boundary Commission's final order, and no election was necessary. ORS 199.495(1).

The "triple-majority" process was used to annex the land on which petitioners reside but do not own.[2] Petitioners, having been denied the right to vote on the matter, sought review of the Boundary

[2]Petitioner Mid-County Future Alternatives Committee is composed of and represents residents of the annexed territories who do not own land.

Commission's orders in the Oregon Court of Appeals, challenging the validity of the "triple-majority" process under the constitutions of the United States and the State of Oregon. The Oregon Court of Appeals voided the annexations, declaring that the "triple-majority" process violated the Privileges and Immunitites Clause of the Oregon Constitution because it gave landowners a privilege not available to electors who are not landowners. Mid-County Future Alt. v. Port. Metro. Area LGBC, 82 Or App 193, 728 P2d 63, **modified**, 83 Or App 552, 733 P2d 451 (1986). Because it invalidated the statute on state constitutional grounds, the court did not reach the federal issue.

Following that decision, the Oregon legislature enacted the statute in question here, ORS 199.534, which

provides:

> Notwithstanding any other provision of this chapter or ORS chapter 222, territory annexed or transferred to a city or district by a minor boundary change approved by a boundary commission's final order adopted after January 1, 1985, but before July 18, 1987, shall be in the annexing city or district by operation of ORS ... 199.490, ...[and] 199.534 ... commencing upon the effective date of the boundary commission's final order.

This enactment effectively "reversed" the decision of the Court of Appeals and rendered petitioners' residences annexed by legislative fiat.[3] Petitioners promptly filed the case at hand to challenge the legality of the new act.

2. How the Federal Question Was Presented.

The federal question involved was

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[3]After enactment of ORS 199.534 the Oregon Supreme Court dismissed an appeal from the Court of Appeals decision, declaring the case "moot". Mid-County Future Alt. v. Port. Metro. Area LGBC, 304 Or 89, 742 P2d 47 (1987).

presented and decided in all proceedings below. Petitioners brought suit in Multnomah County Circuit Court for a declaratory judgment that ORS 199.534 violates two clauses of the Oregon Constitution and the Equal Protection Clause of the 14th Amendment to the United States Constitution because the territories it annexes were designated on the basis of landowner consent and not by all resident electors. The Circuit Court entered summary judgment on May 23, 1988, holding the statute constitutional; it based its decision under the Equal Protection Clause on two decisions of this Court: citing Hunter v. City of Pittsburgh, 207 US 161, 28 S Ct 40, 52 L Ed 151 (1907), it held that the legislature has "plenary power to change the boundaries of political subdidvisions;" and citing Hill v. Stone,

421 US 289, 95 S Ct 1637, 44 L Ed2d 172 (1975), it held that "even if ORS 199.534 could be construed as an indirect restriction on the right to vote, such a restriction...promotes a compelling state interest...in assuring the continued orderly provision of urban services to residents of annexed areas." See p. 46a infra.

Appeal was taken to the Oregon Court of Appeals, where petitioners raised the question, "Does [ORS 199.534] violate the Fourteenth Amendment to the United States Constitution by limiting the right to consent to annexation to landowners?" (Appellants' Brief, p. 2). The Court of Appeals answered the question in the negative: "the statute on its face does not violate [the Fourteenth Amendment] because it grants no one the privilege of franchise or consent and it creates no

classifications." See p. 41a infra.

Petitioners then sought review in the Oregon Supreme Court, contending in part that a statute which indirectly permits landowners but not others to "vote" on which territories the legislature should annex violates the Fourteenth Amendment. (Petition for Review, pp. 4-5). In affirming the courts below the Oregon Supreme Court did not directly address the federal issue, other than to comment that the legislature had "full range of power over municipalities" under Hunter v. City of Pittsburgh, supra. See p. 11a, infra.

REASONS FOR GRANTING THE WRIT

The courts below have decided an important question of federal constitutional law in a way that conflicts with applicable decisions of this Court as well as other federal

courts. In Reynolds v. Sims, 377 U.S. 533, 560-561, 84 S. Ct. 1362, 12 L.Ed2d 506 (1964), this Court concluded that since all citizens have an equal interest in government their votes must be given equal weight. This principle was invoked subsequently to strike down, as repugnant to the Equal Protection Clause, a New York law restricting the vote in school district elections to landowners and parents of schoolchildren, Kramer v. Union Free School District, 395 US 621, 89 S Ct 1886, 23 L Ed2d 583 (1969); and laws in three states limiting the vote in bond authorization elections to property owners, Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed.2d 647 (1969), Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990, 26 L.Ed.2d 523 (1970), and Hill v. Stone, supra. In Kramer v. Union Free School District,

supra, 395 US at 626-627, the Court held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized," and unless the infringement is related to age, residence or citizenship, it will not be tolerated unless shown to be "necessary to promote a compelling state interest."

The failure of the Oregon legislature and courts to adhere to these principles can be traced to a misapprehension of this Court's decision in Hunter v. City of Pittsburgh, supra. In that case the Court upheld the consolidation of two adjacent cities which had been approved by a majority vote in both cities although a majority in the smaller city voted against it. The courts in Oregon-- and perhaps in other jurisdictions as well -- view this decision as giving

state legislatures absolute power over municipal boundaries. See p. 11a; also p. 54a infra. But as this Court made clear when an Alabama city attempted to redefine its boundaries to exclude virtually all black citizens, the state's power is not unlimited, but must yield to Constitutional constraints. Gomillion v. Lightfoot, 364 U.S. 339, 342-345, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960).

The Fourth Circuit Court of Appeals has applied these principles in two annexation cases with analogous facts. In Hayward v. Clay, 573 F.2d 187 (4th Cir.), **cert. denied**, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 351 (1978), the court struck down a South Carolina statute that conditioned annexation on a favorable vote by a majority of property owners and also a majority of registered voters in both the annexing and annexed areas. The

defect in the statute was that "in effect it grants to some individuals -- who are identified on the basis of ownership of realty -- the right to nullify a vote for annexation by the electorate at large." Id. at 189. And in the recent case of Muller v. Curran, 889 F.2d 54 (4th Cir.), **cert. denied**, --U.S.--, 110 S.Ct. 1121, 107 L.Ed2d 1028 (1990), the court struck down a similar Maryland statute. These decisions flatly contradict the ruling by the Oregon Supreme Court in this case.

Whether the Constitution does or does not require a vote when a municipality seeks to expand its borders is not an issue here because there was a vote -- by landowners. The territory designated for annexation in ORS 199.534 -- "territory annexed...by a boundary commission's final order adopted after January 1, 1985 but before July 18, 1987" -- is the same

territory that was purportedly annexed on the basis of landowner consents under the earlier statute declared unconstitutional by the Court of Appeals. To be sure, this presents a somewhat oblique form of discrimination between landowners and non-landowners, but where the right to vote is concerned this Court has refused to tolerate even slight infringement. See, Bullock v. Carter, 405 US 134, 143, 92 S Ct 849, 31 L Ed2d 92 (1972)(Texas statute imposing large filing fees for candidates in primary elections invalidated as denying poor voters equal opportunity to vote for a candidate of their choice).

As this Court observed in Reynolds v. Sims, supra, there is no more fundamental right than the right to choose one's government. 377 U.S. at 561. Petitioners were annexed to cities without their

consent, which was not sought for the simple reason that they did not own land. When the Oregon Court of Appeals declared that process unconstitutional under Oregon's equivalent of the Equal Protection Clause, the Oregon legislature "reversed" the decision and, in ORS 199.534, declared the lands annexed. The result was the annexation of lands at the behest of a majority of landowners -- who may not even live on the annexed land-- without regard for the wishes of the residents.

Petitioners and other renters are no less interested in or affected by their government by virtue of their not owning land. They share with other members of their community, owners and non-owners alike, an interest in the structure and quality of their government. There can be no justification for not granting them an

equal voice in the fundamental choice of what form that government will take.

CONCLUSION

Petitioners pray that the Court issue a writ of certiorari to review the decision of the Oregon Supreme court.

Respectfully submitted,

GREGORY W. BYRNE
1200 Standard Insurance Center
900 S.W. Fifth Avenue
Portland OR 97204
(503) 323-9100

Counsel for Petitioners

IN THE SUPREME COURT OF
THE STATE OF OREGON

MID-COUNTY FUTURE ALTERNATIVES COMMITTEE, an Oregon corporation, and PETER M. SMITH,

Petitioners on Review,

v.

CITY OF PORTLAND, CITY OF GRESHAM, PORTLAND METROPOLITAN AREA LOCAL BOUNDARY COMMISSION, MULTNOMAH COUNTY, and STATE OF OREGON,

Respondents on Review

****

(TC A8711-06867; CA A48513; SC S36060)

On review from the Court of Appeals.*

Argued and submitted November 1, 1989.

Gregory W. Byrne, Portland, argued the cause on behalf of Petitioners on Review. With him on the petition was Byrne & Barrow, Portland.

Jeffrey L. Rogers, City Attorney, Portland, argued the cause on behalf of

Respondent City of Portland.

Michael D. Reynolds, Assistant Attorney General, Salem, argued the cause on behalf of Respondents Portland Metropolitan Areal Local Boundary Commission and State of Oregon. With him on the response were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Matthew R. Baines, Assistant City Attorney, Gresham, argued the cause on behalf of Respondent City of Gresham.

Before Peterson, Chief Justice, and Linde, Carson, Jones, Gillette, Van Hoomissen, and Fadeley, Justices.

GILLETTE, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Multnomah County Circuit Court, Katherine H. O'Neil, Judge Pro Tempore. 95 Or App 556, 770 P2d

604 (1989)

GILLETTE, J.

This is a declaratory judgment proceeding in which plaintiffs seek a declaration that Oregon Laws 1987, chapter 818, section 3 (codified as ORS 199.534),[1] violates the home rule provisions of the Oregon Constitution,

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[1]Oregon Laws 1987, chapter 818, section 3, provides:

"Notwithstanding any other provision of this chapter or ORS chapter 222, territory annexed or transferred to a city or district by a minor boundary change approved by a boundary commission's final order adopted after January 1, 1985, but before the effective date of this 1987 Act shall be gene the annexing city or district by operation of this 1987 Act commencing upon the effective date of the boundary commission's final order. The creation by this 1987 Act of annexations shall not void or impair any prior or subsequent minor boundary changes inside of outside of the affected territory."

Article XI, section 2,[2] and the equal privileges and immunities clause, Article I, section 20,[3] as well as the Equal Protection Clause of the Fourteenth

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2

Article XI, section 2 of the Oregon Constitution currently provides:

"Corporations may be formed under general laws but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of ever city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein as vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon."

3

Article I, section 20 provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Amendment of the United States Constitution. On cross motions for summary judgment the circuit court denied plaintiffs' motion and granted defendants' motion. The court entered judgment dismissing plaintiffs' complaint and declaring Oregon laws 1987, chapter 818, section 3, constitutional.

On appeal, the Court of Appeals affirmed the circuit court. Mid-County Future Alternatives v. City of Portland, 95 Or App 556, 770 P2d 604 (1989). We allowed review to consider the issues presented in this case together with similar issues already before us in Donaldson v. Lane County, Or , P2d (1990) (decided this day). We affirm the decision of the Court of Appeals.

FACTS

The facts of this case are basically undisputed. Plaintiff Peter M. Smith

resides in an area of Multnomah county that has been annexed to the City of Portland under the disputed statute. Plaintiff Mid-County Future Alternatives Committee consists of members who live throughout the area subject to the disputed annexations.

The annexations in dispute originally were ordered by the Portland Metropolitan Area Local Boundary Commission, which followed the procedures set forth in ORS 199.495(1),[4] and former

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[4] ORS 199.495 provides:

"In a proceeding initiated as provided by ORS 199.490(2) and (5):

"(1) If the proposed annexation is approved by the commission, the final order shall be effective at the time specified in the final order except that the effective date shall not be more than one year after the date the final order is adopted. If no effective date is specified in the final order, the order shall take effect on the date

the order is adopted. The order shall not be subject to ORS 199.505."

ORS 199.505 provides for an election approving the annexation by the residents of the area to be annexed if objections to the annexation are filed by a certain number of affected voters.

ORS 199.490(2) (a),[5] the so-called "triple-majority" annexation statutory scheme. The "triple-majority" procedure allows a boundary commission to approve annexation of territory after a city receives a request for the annexation in

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5
Former ORS 199.490(2) (a) provided:

"An annexation proceeding may also be initiated by a resolution adopted by the governing body of the affected city or district upon receiving consent to annex their land in writing from more than half of the owners of land in the territory proposed to be annexed, who also own more than half of the land in the territory proposed to be annexed and of real property therein representing more than half of the assessed value of all real property in the territory proposed to be annexed."

writing signed by more than half the land owners in the proposed annexation territory, who also own more than half the land in the proposed annexation territory, which in turn represents more than half the assessed value of all land in the proposed annexation territory. Unlike most annexation procedures, the "triple-majority" procedure prevents other landowners or residents from objecting to the annexation and forcing a vote. ORS 199.495(1).

In an earlier case, these same plaintiffs challenged the constitutionality of "triple-majority" annexations and prevailed at the Court of Appeals level. Mid-County Future Alt. v. Port. Metro. Area LGBC, 82 Or App 193, 728 P2d 63, modified, 83 OR App 552, 733 P2d 451 (1987). We then granted review, but the Oregon Legislature subsequently

enacted Chapter 181, section 3, Oregon Laws 1987--the statute under review here. Because of this enactment, we concluded that the challenge to the "triple-majority" annexation procedure was moot. Mid-County Future Alt. v. Metro. Area LGBC, 304 Or 89, 742 P2d 47 (1987). In that decision, we expressed no opinion as to the constitutionality of the "triple-majority" annexation procedure or Chapter 818, section 3, Oregon Laws 1987. Shortly thereafter, the plaintiffs initiated this action.

Plaintiffs raise two distinct constitutional challenges to Chapter 818, section 3, Oregon laws 1987: (1) that the legislative enactment of a boundary change is an amendment to a municipality's charter which is prohibited by the home rule provisions of the Oregon Constitution; and, (2) that

this enactment, being a legislative ratification of the earlier "triple-majority" annexations, suffers from the same constitutional defect the Court of Appeals found in the earlier annexations. As we shall explain, we find the "home rule" arguments to be irrelevant. The plaintiffs' alternative, right-to-vote theory is not justified by any statutory or constitutional text.

HISTORICAL BACKGROUND

Historically, in the United States,

> "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them * * *. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with other municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the

> consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

Hunter v. City of Pittsburgh, 207 US 161, 178-179, 28 S Ct 40, 52 L Ed 151 (1907). In Oregon, the state legislative retained this full range of power over municipalities until the enactment of the home rule provisions of the Oregon Constitution in 1906.[6] Rose v. Port of Portland, 82 Or 541, 560-61, 162 P 498 (1917). This pre-1906 situation caused

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[6] Up until 1893, all incorporations of cities were the results of special legislative acts. In 1893, the legislature enacted a general statute permitting self-incorporation. Oregon Laws 1893, page 120. This statute was rarely used prior to the enactment of the home rule provisions of the Oregon Constitution in 1906. See Ronchetto and Woodmansee, Home Rule in Oregon, 18 Or Law Rev 216 (1939).

much discontent. Many people perceived the legislature and those who could influence it as politically self-interested rascals and not as statesmen truly concerned with the needs of the people of Oregon.[7]

As a result, the Oregon Constitution was amended in 1906 to include two provisions establishing and protecting local "home rule."[8] Unfortunately, these

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7 See the Portland Morning Oregonian, July 16, 1906, page 10, column 1.

8 Article IV, section 1(5) of the Oregon Constitution currently provides:

> "The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising these powers shall be provided by general laws, but cities may provide the

manner of exercising these powers as to their municipal legislation. In a city, not more than 15 percent of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation."

See also Or Const Art XI, section 2 (set out in footnote 2. infra)

two provisions created as many problems as they solved. Since 1906, home rule litigation has not long been absent from the courts of this state.[9] Even more

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9

The first home rule case to reach the Supreme Court was Farrell v. Port of Columbia, 50 Or 169, 91 P 546, 93 P 254 (1907). In that case, the court struck down a special law enacted by the legislature incorporating the Port of Columbia. That law, although similar to an earlier, constitutionally valid law creating the Port of Portland, was invalid because it was enacted subsequent to the creation of the home rule provisions of the Oregon Constitution. Consequently, the Oregon legislature no longer had the authority to create municipal corporations by special law. But see State ex rel Eckles v. Woolley, 302 Or 37, 726 P2d 918 (1986).

troublesome is the fact that this court has not been completely clear as to exactly what the home rule provisions mean. A review of some of the major cases demonstrates the extent of the problem.

In an early home rule case, Straw v. Harris, 54 Or 424, 103 P 777 (1909), this court considered the validity of the recent incorporation of a port district that included areas controlled by several small municipalities. The municipalities challenged the creation of the port district, claiming that the legislature had amended their charters by depriving them of their preexisting authority over their waterfronts. This court determined that the primary purpose of the home rule amendments was to prevent the legislature from revising, amending, or repealing municipal charters by special law. The legislature could, however, amend such

charters by general law. In that case, the port district was created pursuant to a general law allowing the creation of port districts. The court reasoned:

> "Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control. The State, therefore, regardless of any declarations in its constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental laws. This, under the constitution as it now stands, may be done by the legislature through general laws only, and the same authority may be invoked by the people through the initiative by either general or special enactments; only the legislature being inhibited from adopting the latter method."

54 Or at 436-37.

Subsequently, in Kalich v. Knapp, 73 Or 558, 142 P 594, 145 P 22 (1914), this court held unconstitutional a general Oregon law regulating the speed of

vehicles insofar as the law purported to regulate the speed of vehicles inside the City of Portland, where the speed of vehicles was already regulated by a Portland ordinance. Similarly, in Pearce v. Roseburg, 77 Or 195, 150 P 855 (1915), the court held that a legislative attempt to "restrict the power of cities and towns to levy taxes (was] antagonistic to Section 2, Article XI, of our present Constitution which gives to cities and towns the power to enact and amend their charters, subject only to the Constitution and criminal laws of the state." Id. at 208. According to the court,"[c]ity taxation is entirely a local matter with which the people of the state at large have no concern." Id. Therefore, although the state has the authority to enact general laws affecting municipalities, such laws could not limit

the power of a city to impose taxes or regulate vehicle speeds.

On the other hand, Rose v. Port of Portland, 82 Or 541, 162 P 498 (1917), held that the home rule provisions of the Oregon Constitution did not inhibit the legislature's power to enact general laws, even those which significantly affected the charters of cities, towns, and other municipalities.

Later, in City of Portland v. Welch, 154 Or 286, 59 P2d 228 (1936), the Supreme court ignored Kalich v. Knapp, supra and held that a general law limiting the indebtedness or tax levy of municipalities is a valid use of legislative power. However, the court went on to hold that the law in question, as applied to cities in Multnomah County, was a special law because its attempt to

treat all four cities in Multnomah County the same regardless of their population was an example of "classification 'run wild'." Id. at 300. That is, the law was a special and local act, not a general law.

In State ex rel Heinig v. Milwaukee et al, 231 Or 473, 373 P2d 680 (1962), the Supreme Court overturned a general law concerning the employment and discharge practices in municipal fire departments. The court determined that the hiring and firing of members of a municipal fire department is a matter of purely local concern even though the manner of dealing with such personnel may have some effect on affairs outside the city's boundary. According to the court, "'The real test is not whether the state or the city has an interest in the matter, for usually they both have, but

whether the state's interest or that of the city is paramount."' Id. at 481 (citing McDonald, American City Government and Administration, p 79 (3rd ed 1941)).

This balancing test remained in effect until the most recent reinterpretation of Oregon home rule in La Grande/Astoria v. PERB, 281 Or 137, 576 P2d 1204 (1978), where this court held that:

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so,

> unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."

Id. at 156. (Footnote omitted.) Thus, the form and structure of local governments is protected from most state interference, but the state may with greater freedom interfere with local municipalities' substantive laws.

This ambiguous and confusing history of "home rule" decisions provides little guidance to this court, the lower courts, the various municipalities, and the state legislature, in a variety of circumstances. It is of no help in this case because we conclude that the annexations in this case did not implicate city government -- and, hence, home rule authority -until after the annexations were complete.

ANNEXATION

One of the earliest annexation cases after the enactment of the home rule provisions was Thurber v. McMinnville, 63 Or 410, 128 P 43 (1912). In Thurber, this court invalidated an annexation because the voters of the territory to be annexed were not allowed to participate in the election then required by statute. In so holding, the court made it clear that home rule cities do not inherently have the power to annex territory:

> "A majority of this court has never held that a city has the authority, by virtue of the (home rule provisions of the Oregon Constitution], to condemn lands outside of the city limits. On the contrary, we hold that, without express legislative authority granted to all cities of the same class, it has neither power to condemn land for municipal purposes, nor any other extra territorial legislative authority whatever. In the absence of such permission, its attempted legislation outside its limits is as powerless to affect outlying territory as an ordinance

> passed by the city counsel of Boston would be to regulate the affairs of the town of McMinnville."

Id. at 415-16.

The home rule provisions of the Oregon Constitution protect the city from some legislative interference with its internal policies and practices, but they do not grant cities any authority to act outside of their borders. This distribution of power was analyzed and explained by this court as early as 1916:

> "Powers exercisable by cities and towns may be placed in two separate classes, which, for the sake of brevity and the want of better terms, will be designated as: (1) Intramural; and (2) extramural. When the legal voters of a city enact municipal legislation which operates only on themselves and for themselves, and which is confined within and extends no further than the corporate limits, then such voters are exercising intramural authority. When, however, the legal voters of a city attempt to exercise authority beyond the corporate limits of their municipality, they are using an extramural power.

"* * * * *

"The legal voters of cities and towns are not obliged to look to the legislature for the right to exercise any intramural power; but the whole sum of intramural authority is set at large, and the legal voters may exercise all of that authority or only such part of it as they may desire, subject, of course, to the Constitution and criminal laws of the state, and subject also to the right of the people of the commonwealth to amend charters or enact supervisory legislation by the use of the initiative: Robertson v. Portland, 77 Or. 121 (149 Pac. 545, 547). Extramural authority, however, is not available to the legal voters of cities and towns, unless the right to exercise it has first been granted either by a general law enacted by the legislature or by legislation initiated by the people of the whole state. The right to employ intramural authority finds its source in the language of the Constitution, because the legal voters of cities and towns are by that instrument expressly empowered to enact and amend their own charters; but permission to employ extramural authority must be granted to cities and towns before the privilege can be exercised. one power coexists with the Constitution, while the other power does not exist at all, unless the people of the whole state either

> grant the authority themselves by the initiative or extend the privilege through their representative, the legislature. [Citations omitted.] * * * Precedents have firmly established the rule that extramural power cannot be employed by cities and towns unless a law exists permitting it, and some prior adjudications have advanced a step further, and held that a general law enacted by the legislature permitting the exercise of extramural power does not by its own force ingraft that power upon the charter of a city. but the general law may be likened to a continuous offer of a power which nevertheless cannot be used until the legal voters of the city have accepted the offer by amending their charter so as to include the proffered power. [Citations omitted.] While it may be dictum, still it would seem that there is much force in the contention that, if a city cannot exercise a given power unless permission is first granted, and if the legislature can lawfully grant that permission, then the legislature may with equal right regulate and supervise the power granted or, unless prevented by the intervention of vested rights, withdraw it entirely."

State v. Port of Astoria, 79 Or 1, 17-20, 154 P 399 (1916).

This court subsequently and

specifically applied the Port of Astoria analysis to an annexation case in Spence v. Watson, 182 Or 233, 238, 186 P2d 785 (1947), and went on to hold:

> "The conclusion is inescapable that the legislature has the authority to enact a law prescribing the procedure to be followed in determining whether any prescribed area outside of the corporate limits of an incorporated town or city shall be annexed and become a part of such town or city."

Of course, a determination that annexation is within the state's legislative purview does not resolve this case. Even though a city must follow a legislatively-approved procedure to annex territory, it does not follow that the legislature can decree any annexation for any reason.[10] There still is room to

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10 Annexations for health hazard reasons under ORS 222.855 are a different matter. Cities are still state agencies subject to certain controls, and the independence of those living outside

cities is by no means absolute.

argue, as petitioners do, that the borders of a municipal corporation are an integral part of the corporate charter which cannot be altered by the legislature. See Or Const, Art. XI, Section 2.

Such an argument does not aid petitioners here. Even if we assume that a city's borders are inherently a part of the corporate charter which cannot be altered by the legislature against the municipality's will, we read the charters of both the City of Portland and the City of Gresham as permitting legislative alteration of their borders.[11] The

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[11] We reject petitioners' argument that no matter what a city's charter may say about its boundaries, any change in the boundaries is an amendment to the charter and therefore beyond the legislature's power. The two cases plaintiff cites for this proposition are not controlling.

Cooke v. Portland, 69 Or 572, 139 P 1095 (1914), involved a charter that described the city's boundaries by metes and bounds. The charters involved in this case are not so restrictive. Schmidt et al v. City of Cornelius, 211 Or 505, 316 P2d 511 (1957), involved an attempt to withdraw territory from a home rule city without the consent of the city. Such a situation is far different from the present case where the legislature seeks to add territory to a city with the city's consent and approval.

Charter of the City of Portland, Chapter I, Article 2, Section 1-202, provides:

> "The City of Portland may annex additional territory and other cities or areas may be consolidated or merged with the City in any manner permitted by statute."

(Emphasis supplied.) We have no difficulty in concluding that a statutorily-directed annexation of territory is an annexation "permitted by statute."

The Charter of the City of Gresham, Chapter I, section 3, provides:

> "The city shall include all territory encompassed by its boundaries

as they now exist or hereafter are modified by voters, by the council, or by any other agency with legal power to modify them * * *."

(Emphasis supplied.) Although this charter presents a somewhat harder question, we believe that the legislature qualifies as "an agency with the legal power to modify" municipal boundaries. The initial power to decree an annexation still lies where it has always been -- with the legislature. Rosa v. Port of Portland, supra; Hunter v. City of Pittsburgh, supra. The legislature may choose to exercise, delegate, or ignore this power, but it is the legislature's power.

ARTICLE 1, SECTION 20

Plaintiffs contend that Oregon Laws 1987, Chapter 818, section 3, by ratifying the earlier unconstitutional "triple-majority" annexations is itself

constitutionally flawed. We disagree.

Assuming, without deciding, that the "triple-majority" annexation procedure is unconstitutional, as held by the Court of Appeals in Mid-County Future Alt. v. Port. Metro. Area LGBC, supra, such unconstitutionality does not affect a subsequent legislative annexation. The present enactment does not purport to derive any authority from the prior act -- each stands on its own as an expression of legislative will.

The fact that the present legislation cross-references annexations effected under the former law does not change our view. The cross-reference is only to the property annexed, not to any power exercised. The territories in question have become part of Portland and Gresham, not because an arguably unconstitutional statutory process

prevented residents from voting against the annexations, but because the legislature took an independent look at the situation, exercised its own judgment, and annexed the territories.[12]

12

Plaintiffs also claim support from the decision of the legislative counsel to specifically enumerate those sections amended by the Or Laws 1987, ch 818, especially ORS 199.490, in the codified version of ch 818, section 3. The codification at ORS 199.534 reads:

> "Notwithstanding any other provision of this chapter or ORS chapter 222, territory annexed or transferred to a city or district by a minor boundary change approved by a boundary commission's final order adopted after January 1, 1985, but before July 18, 1987, shall be in the annexing city or district by operation of ORS 198.855, 199.490, 199:531, 199 534 222.120 and 222.170 to 222.177 commencing upon the effective date of the boundary commission's final order. The creation by ORS 198.855, 199.490, 199 531 199.534, 222.120 and 222.170 to 222.177 of annexations shall not void or impair any prior or subsequent minor boundary changes inside or outside of the affected territory."

(Underlined materials changed in codification.) Plaintiffs argue that by making explicit reference to ORS 199.490 the legislation demonstrates its reliance on the validity of the underlying boundary commission orders. That is not the case. Even though former ORS 199.490 was the "triple majority" annexations section, current ORS 199.490 was amended to create a significantly different procedure and, in any case, ORS 199.534 does not depend on either section for its validity.

THE RIGHT TO VOTE

Finally, petitioners argue the absolute proposition that subjecting them to the legislatively-approved annexations without being permitted to vote on the annexations is impermissible. That proposition does not follow from any specific constitutional language or from anything we have thus far enunciated in this opinion concerning the legislature's plenary authority to legislate concerning annexations, but plaintiffs rely on the

following language from Reilley v. Secretary of State, 288 Or 573, 579, 607 P2d 162 (1980) : "[T]he legislature may not impose a new local government apparatus on a selected group of citizens, without giving those people a chance to approve or veto the proposal."

In Reilley, this court held that the legislature did not violate Article XI, section 2, in reorganizing the Metropolitan Service District (a district covering parts of Multnomah, Washington and Clackamas Counties and many of the cities found therein) because the district's reorganization had been submitted to the affected voters for approval. Id. at 581. The comment on which the petitioners rely thus is a dictum, because there had been a vote in that case. Moreover, the dictum may not even have been an appropriate one under

the facts of that case, inasmuch as a majority of one of the involved political subsidiaries (Clackamas County) had voted against the reorganization. Id. at 576.

This Court also suggested that vote by those who were to be annexed into a governmental unit was constitutionally required in Thumber v. McMinnville, supra The Thumber court declared that "the right of the people of the district or territory sought to be annexed to be permitted to vote upon the question under some method is a constitutional one that cannot be taken away." 63 Or at 417. As the Thurber case concerned a statute granting the right to vote on an annexation, its broad constitutional holding was a dictum. Furthermore, Thumber cited no authority for the holding, which is not a surprise because there is none. There is no federal

constitutional right to vote on municipal annexations. Hunter v. City of Pittsburgh, supra. We are also unable to find any such right in the Oregon Constitution. Thumber's broad statement concerning the constitutional right to vote on annexation is disavowed. A similar suggestion in Landess v. City of Cottage Grove, 64 Or 155, 129 P 537 (1913) is also disavowed. State ex rel v. Port of Tillamook, 62 Or 332, 342, 124 P 637 (1912) was cited by the court in Landless as support for this proposition, but, in fact, the Port of Tillamook court merely stated that municipalities had no innate authority to annex territories without the consent of the legal voters residing in the area to be annexed. The people of the state as a whole, on the other hand, could pass a law permitting such an annexation. Id. at 342-43.

Petitioners are mistaken when they assert that they must, as a matter of constitutional law, be allowed to vote on any annexation to which they might be subjected. To allow such a vote may be commendable public policy. To allow it may even be constitutionally mandated, if a vote is given to some who will (or whose property will) be annexed while it is not given to others similarly situated. See the Court of Appeals earlier opinion in Mid-County Future Alt. v. Port Metro. Area LGBC, supra. But desirability in some circumstances, or even constitutional necessity in others, does not demonstrate constitutional necessity in all circumstances. We hold that there is no such automatic right to vote on extension of city authority over property one either owns or occupies where, as in the present case, the

legislature has itself created the extension.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

IN THE COURT OF APPEALS OF

THE STATE OF OREGON

MID-COUNTY FUTURE ALTERNATIVES COMMITTEE, an Oregon corporation, and PETER M. SMITH,

Appellants,

v

CITY OF PORTLAND, CITY OF GRESHAM, PORTLAND METROPOLITAN AREA LOCAL BOUNDARY COMMISSION, MULTNOMAH COUNTY, and STATE OF OREGON,

Respondents.

(A8711-06867; CA A48513)

Appeal from Circuit Court, Multnomah County.

Katherine H. O'Neil, Judge pro tempore.

Argued and submitted December 16, 1988.

Gregory W. Byrne, Portland, argued the cause and filed the briefs for appellants.

Michael O. Reynolds, Assistant Attorney General, Salem, argued the cause for respondents Portland Metropolitan Area Local Boundary

Commission and State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Linda DeVries Grimms, Assistant Attorney General, Salem.

Jeffrey L. Rogers, City Attorney, Portland, argued the cause for respondent City of Portland. With him on the brief was Adrianne Brockman, Deputy City Attorney, Portland.

Matthew R. Baines, Assistant City Attorney, Gresham, argued the cause for respondent City of Gresham. With him on the brief was Thomas Sponsler, City Attorney, Gresham.

Laurence Kressel, Multnomah County Counsel, Portland, filed the brief for respondent Multnomah County.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

DEITS, J.

Affirmed

FILED: March 8, 1989

DEITS, J.

Plaintiffs in this declaratory judgment action challenge the constitutionality of Oregon Laws 1987, chapter 818, section 3, which provides, in pertinent part:

> "Notwithstanding any other provision (ORS chapter 1991 or ORS chapter 222, territory annexed or transferred to a city or district by a minor boundary change approved by a boundary commission's final order adopted after January 1, 1985, but before the effective date of this 1987 Act shall be in the annexing city or district by operation of this 1987 Act commencing upon the effective date of the boundary commission's final order."1

The trial court held that the statute is constitutional, and plaintiffs appeal. We affirm.

Section 3 was enacted in apparent response to our decision in Mid-County Future Alt. v. Port. Metro. Area LGBC, 82 Or App 193, 728 P2d 63 (1986), modified 83 Or App 552, 733 P2d 451, rev dismissed

304 Or 89, 742 P2d 47 (1987). We held there that the so-called 'triple majority' annexation procedure of ORS 199.490 2 and ORS 199.495 violated the equal privileges and immunities requirement of Or Const, Art I, Section 20, because it allowed annexations with the consent of landowners in the affected areas and did not give nonlandowners the opportunity to consent or vote.

Plaintiffs argue that section 3 suffers from the same defect, because some of the annexations that it validates were initiated through the triple majority procedure. Therefore, plaintiffs contend, the statute offends Article I, section 20, and the Equal Protection Clause of the Fourteenth Amendment. They also argue that section 3 is contrary to the Home Rule Amendment, Or Const, Art XI, S 2, because it changes city

boundaries and therefore constitutes a state legislative amendment of city charters.

In Donaldson v. Lane County Local Govt. Bdry. Comm., 93 Or App 280, 287-88, 761 P2d 1349, rev den 307 Or 245 (1988), we rejected a virtually identical home rule argument and held that statutory provisions that affect city boundaries are consistent with Article XI, section 2, at least with regard to cities whose charters do not describe their boundaries. The charters of the two cities involved in this case do not do so. Plaintiffs suggest that Donaldson was wrongly decided. We disagree.

Plaintiffs argue that the statute violates Article 1, section 20, and the Fourteenth Amendment. 3 However, the statute on its face does not,violate those constitutional provisions, because

it grants no one the privilege of franchise or consent and it creates no classifications. The essence of plaintiffs' arguments is that section 3 is tainted with the constitutional infirmity of the underlying- annexation procedures that it purports to cure and does by "indirection" what the triple majority statutes did directly. Plaintiffs argue that a boundary commission's approval of an annexation cannot alter the fact that other procedural stages leading to the annexation were constitutionally defective and that section 3 cannot validate the end result of the defective process by singling out one of its stages--the commission's final order--as the sole effective event.

However, as suggested by the Supreme Court in Mid-County Future Alt. v. Port.

Metro. Area LGBC, supra the passage of section 3 rendered moot the issue of constitutionality of the tripple majority statutes.

> "These annexations no longer depend for validity on the constitutionality of ORS 199.495(1) as it relates to annexations pursuant to ORS 199.490(2). The territory in dispute has been annexed by another means, legislative command." 304 Or at 92.

In other words, section 3 became the operative authority for the annexations that it addresses, independent of the triple majority statutes or of any others that might have been involved in the process before the section was enacted. Therefore, any constitutional problems with other statutes became irrelevant to the validity of the annexations accomplished by the adoption of section 3.

Section 3 provides that the

annexations to which it relates are effective 'by operation of this 1987 Act.' It also states that its provisions apply, notwithstanding any other provisions of ORS chapter 199. The legislature thus made clear that section 3 is an independent source of validity for the annexations that it covers. We hold that section 3 is constitutional.4

Affirmed.

FOOTNOTES

1

The section was codified as ORS 199.534. However, the codified version erroneously substituted the words 'by operation of ORS 198.855, 199.490, 199.531, 199.534, 222.120 and 222.170 to 222.177' for the words 'by operation of this 1987 Act' in the enacted version. The language enacted by the legislature, of course, prevails. We will refer to the challenged statute as 'section 3.'

2

ORS 199.490 was later amended by Or Laws 1987, ch 818, section 6. The amendment is not relevant here.

3

We assume the correctness of our holding in Mid-County Future Alt. v. Port. Metro. Area LGBC, supra, that the triple majority procedure was unconstitutional. The Supreme Court dismissed the petition for review as moot, '(without expressing an opinion on the merits." 304 Or at 92.

4

Plaintiffs suggest that there may be an Oregon constitutional right to vote on annexations. They say, however, that that question "is beside the point in this case, as such a right is granted by statute." No such right is granted by section 3 and, by its terms, it applies, notwithstanding the provisions of ORS chapter 199 that plaintiffs identify as the source of electoral rights.

IN THE CIRCUIT COURT OF

THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MID-COUNTY FUTURE ALTERNATIVES COMMITTEE, an Oregon corporation and PETER M. SMITH,

Plaintiffs

No. A8711-06867

V.

OPINION AND ORDER

CITY OF PORTLAND, CITY OF GRESHAM, PORTLAND METROPOLITAN AREA LOCAL BOUNDARY COMMISSION, MULTNOMAH COUNTY, and STATE OF OREGON,

Defendants.

Plaintiffs seek a declaration that Section 3, Chapter 818, Oregon Laws 1987 (codified as ORS 199.534) violates the Oregon and United States Constitutions. ORS 199.534 effectively overruled the decision in Mid-County Future Alt. v. Metro. Area LGBC, 82 Or App 193, 728 P2d 63 (1986); 83 Or App 552, 733 P2d 451

(1987). ORS 199.534 validates nunc pro tunc the annexations invalidated by that decision and returned the boundaries of 29 cities and districts within Multnomah and Lane Counties to their configurations as they were prior to the decision. As a result of that case, the individual plaintiff, Peter M. Smith (and 30,000 others) no longer lived within the city limits of Portland. ORS 199.534 put Smith (and the 30,000 persons similarly situated) back into the bounds of Portland.

The parties have filed cross motions for summary judgment. They agree that there are no genuine issues of material fact with one exception discussed immediately below.

1. Standing. The Portland Metropolitan Area Local Boundary Commission ("the Boundary Commission")

urges that the plaintiffs do not have standing to attack what it characterizes as a de facto annexation. The Boundary Commission argues that plaintiffs must proceed by writ or, alternatively, in a remonstrance proceeding. Therefore, it argues the court should decline to consider plaintiffs' motion for summary judgment.

The Boundary Commission has mischaracterized the issue before the court. Plaintiffs are challenging the constitutionality of a statute which locates boundaries at the same place they had been after an annexation process which has been declared unconstitutional. In reestablishing the boundaries, the Legislature itself did not engage in annexation. It established boundaries. Since the plaintiffs are not challenging an annexation, de facto or otherwise,

they do not have to meet the standing requirements of any annexation procedure. It would be inappropriate for plaintiffs to proceed by writ.

The Boundary Commission states that there are material issues of fact regarding the ability of the plaintiffs to qualify for a remonstrance procedure. Any such factual issues are irrelevant.

There are no genuine issues of material fact in this case. Nothing precludes this court from granting a motion for summary judgment.

2. Home Rule. Plaintiffs argue that ORS 199.534 violates the home rule provisions of the Oregon Constitution. Art. XI, Sec. 2, Oregon Constitution.

In determining whether a state statute violates the home rule provisions of the Oregon Constitution, the controlling issue is whether the

challenged statute governs a structure or procedure of local government such as an election, the qualification and selection of local government personnel, taxation and finance or judicial procedures. LaGrande/Astoria v. PERB, 281 Or 137, 156, 576 P2d 1204 (1978). In this case, the answer is no. ORS 199.534 does not impinge on any of the powers reserved by the home rule amendments to the citizens of local communities.

Contrary to plaintiffs' assertions, ORS 199.534 does not "have the effect of" amending the charters of Portland and Gresham. ORS 199.534 restores the boundaries established by various political subdivisions between January 1, 1985, and July 18, 1987. The establishment, extension, and contraction of the boundaries of a city or town is a purely political matter which is entirely

within the power of the state legislature to regulate. Hunter v. Pittsburgh, 207 US 161, 28 S Ct 40, 52 L Ed 151 (1907); Horner's Market v. Tri-County Trans., 2 Or App 288, 296, 467 P2d 671, rev. den. 256 Or 124, 471 P2d 798 (1970).

Even if ORS 199.534 did regulate the structure and procedures of local agencies in violation of the home rule amendments, the regulation would be justified by the "need to safeguard the interests of persons or entities affected by the procedures of local government." LaGrande/Astoria, supra, 281 Or at 156. The entities which previously served the annexed areas with water, sewers, police protection, etc., have long since been supplanted by new entities. The state has a valid, substantive objective to protect residents of the affected areas from the disruption which would be caused by a

rollback of the boundaries. LaGrande/Astoria v. PERB., supra, 281 Or at 148.

3. Privileges and Immunities: Oregon Constitution. Plaintiffs argue that the statute violates the privileges and immunities clause of the Oregon Constitution. Oregon Constitution, Art. I, Sec. 20. Plaintiffs argue that since the boundaries were set in a manner previously held to be unconstitutional, ORS 199.534 is itself an unconstitutional annexation process. They point out that the landowners alone determined the boundaries which were utilized by the statute.

First, as discussed above, there is no Constitutional right to vote on a boundary change. Second, for legislation to be invalid under Art. I, Sec. 20, there must be an element of disparate

treatment. The Legislature must create classifications of people and treat the classifications differently. State v. Clark, 291 Or 231, 239-240, 630 P2d 810 (1981). There are no classifications and no disparate treatment under ORS 199.534. ORS 199.534 did not provide anyone with a vote on the boundary changes. Since ORS 199.534 does not provide any elector with a vote, no classification is created, and there can be no need for an analysis under Art. I, Sec. 20.

4. Equal Protection: U.S. Constitution. Plaintiffs urge that ORS 199.534 is an indirect restriction on the right to vote and, therefore, subject to a strict scrutiny analysis under the equal protection clause of the 14th Amendment to the United States Constitution. Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5, 10, 21 L.Ed.2d

24 (1968). This contention is incorrect.

First, as noted above, ORS 199.534 does not grant the right to vote to some electors and not to others. The Legislature acted under their plenary power to change the boundaries of political subdivisions without creating any classifications. Hunter v. Pittsburgh, supra. There is no basis for a challenge under the 14th Amendment.

Second, even if ORS 199.534 could be construed as an indirect restriction on the right to vote, such a restriction can be allowed if it promotes a compelling state interest. Hill v. Stone, 421 U.S. 289, 297-298, 95 S.Ct. 1637, 1643, 44 L.Ed.2d 172 (1975). There is a compelling state interest in assuring the continued orderly provision of urban services to residents of the annexed areas.

Conclusion. Plaintiffs have

standing to challenge the constitutionality of ORS 199.534. The summary judgment of plaintiffs is denied. Summary judgment is granted for defendants: ORS 199.534 is a valid, constitutional enactment.

DATED this 22nd day of April, 1988.

Katherine H. O'Neil
Judge pro tem